rate. *Benton* v. *Pratt*, 2 Wend. 385; *Rice* v. *Manley*, 66 N. Y. 82. Whatever land, therefore, the Omaha Company obtained through the agency of the Legislature as a result of its wrong-doing is held in constructive trust for the Portage Company and its creditors. This decision "neither impeaches the validity of the action of the Legislature, nor casts any imputation upon its knowledge or motives." It is a little difficult to follow the application of *Lumley* v. *Gye* to this part of the case. The Legislature was under no contract to the Portage Company, the benefit of which was frustrated by the Omaha's Company's wrongful intermeddling. The land already belonged to the Portage Company, though its title was perhaps defeasible.

In the other branch of the case the authority of *Lumley* v. *Gye* is, however, unequivocally recognized, although the citation of that case must be regarded rather as illustrative than essential to the decision. It is, moreover, to be borne in mind that the difficulties attending the definition of a "malicious interference" or "an act which in law and in fact is a wrongful act" (the phrase of Brett, L. J., in *Bowen* v. *Hall*, 6 L. R. 6 Q. B. D. 333, quoted with approval by Mr. Justice Brewer) do not arise on the facts admitted by demurrer. The action of the Omaha Company which caused the breach of the Portage Company's contract with Angle was fraudulent, not merely "malicious," or "without lawful excuse." Cases like *Walker* v. *Cronin*, 107 Mass. 555, also cited by the court, raise far-reaching questions which are not here involved. It is also worth noticing that the distinction between contracts for personal services and contracts for labor or the sale of goods, still occasionally insisted upon, is not mentioned by Mr. Justice Brewer.

TITLE BY ESTOPPEL. — The doctrine of *White* v. *Patten*, 24 Pick. 324, — that title afterwards acquired by the grantor passes by estoppel to the grantee under a warranty deed not only as against the grantor but also as against one holding by descent or grant from him after acquiring the new title, — has been upheld and extended in the recently reported case of *Ayer* v. *Philadelphia & Boston Face Brick Co.*, 159 Mass. 84. Though scarcely inconsistent with the previous attitude of the court, its conclusion illustrates how arbitrary the American doctrine is.

The case arose on a writ of entry to foreclose a mortgage. One Waterman made a first mortgage in 1872, and another, subject to the first, in 1874. The first was foreclosed in 1876, and the following year the land was reconveyed to Waterman. Then the holder of the second mortgage conveyed to a third person, and the latter to the demandant. The tenant was a grantee without notice under Waterman. In 1876 Waterman was adjudged a bankrupt and received his discharge. The demandant claimed that, by virtue of a covenant of warranty in the second mortgage deed, the legal title to the land when afterwards acquired by Waterman passed at once to the demandant by estoppel. The second mortgage purported to convey only an equity of redemption, while the covenant had been previously held (157 Mass. 57), in a case between the same parties, to be more extensive than the grant. In *White* v. *Patten* the grant was coextensive with the covenant. The same rule was applied in both cases; the reason for its application here being that if a different one were laid down it would only "introduce further technicality into an artificial doctrine." Holmes, J., speaking for the court, said: "The estoppel is determined by the scope of the conventional asser-

tion. . . . But the scope of the conventional assertion is determined by the scope of the warranty which contains it. Usually the warranty is of what is granted, and therefore the scope of it is determined by the scope of the description. But this is not necessarily so; and when the warranty says that the grantor is to be taken as assuring you that he owns and will defend you in the unencumbered fee, it does not matter that by the same deed he avows the assertion not to be the fact." Thus an unusual significance is attached to a covenant of warranty, quite aside from the intention of the parties as disclosed by a fair interpretation of the deed.

There are two grounds upon which estoppel has generally been placed: (1), that the covenant is an assertion which the covenantor cannot contradict, — estoppel in the strict sense; and (2), to avoid circuity of action.

The doctrine of estoppel by representation rests upon the ground that "a man shall not be permitted to allege a fact to be different from what he has expressly asserted it to be in his own deed" (143 Mass. 232). What then has the grantor asserted? what has he purported to convey? The representations in the warranty are merely implied and must be construed with the rest of the instrument to ascertain the intention of the parties. If it may be inferred from the warranty that the fee was to pass, this is distinctly negatived by the recitals that all the grantor had and all he purported to convey was an equity of redemption. The truth plainly appeared on the face of the deed. How then can it be said that the grantor is estopped from setting up the first mortgage when he has asserted in his deed that his title was subject to it? It seems impossible to rest the estoppel on any representation. In those cases that have held that an estoppel exists although the contract in the covenant is barred, the decision has been based on the assertions in the deed, but in all of them the grant has been coextensive with the covenant (18 How. 82; 10 Ala. 504, 510; 80 Va. 355).

The other ground upon which the doctrine of estoppel is usually placed, namely, to avoid circuity or multiplicity of actions, is founded on the personal promise to indemnify contained in the covenant. But "if the grantee were not entitled to recover the value of the land on the grantor's covenant of warranty, then in such a case, it is obvious that this species of estoppel would not be applicable" (13 Pick. 116, 119). The discharge in bankruptcy precludes it here. Thus both of the above reasons for raising an estoppel fail.

The covenant cannot operate as a feudal warranty, — by way of rebutter, for it is well settled that a feudal warranty so operated only when it had an estate to support it, and it was always commensurate with the estate conveyed. Shep. Touch. 201: Co. Lit. 386 a: 10 Co. 96. If the true ground of the decision is to be found in the statement that the estoppel is a "technical effect of a technical representation," it is not very satisfactory.

The theory that the legal title passes inexorably by operation of law arose when legal remedies were employed to supply the want of equitable jurisdiction. The equitable origin of the fiction is now forgotten, and the rule is applied not only as against the grantor but also as against a purchaser without notice. The court explains its position by saying in reference to the rule of *White* v. *Patten*: "It is urged for the tenant that this rule should not be extended. But if it is a bad rule, that is no reason for making a bad exception to it." Such a view of the case is certainly open to question. Rawle, Covenants for Title, § 259 *et seq.*